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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 42nd MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Friday, 17 July 1998, at 7 p.m.

Chairman: Mr. P. KIRSCH (Canada)

CONTENTS

Agenda item		*Paragraphs*
11	Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (*continued*)	1-36
-	Report of the Committee	37-42

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The meeting was called to order at 7.15 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/C.1/L.76 and Corr.1 (French only), Add.1, Add.2 and Corr.1, Add.3-4, Add.5 and Corr.1 and Corr.2 (French only), Add.6 and Corr.1, Add.7-8, Add.9 and Corr.1, Add.10-13* and Add.14, L.81, L.90, L.94 and L.95)

1. **The CHAIRMAN** thanked delegations for the cooperation, patience and understanding they had shown over the past few days when the Conference had been under pressure to complete its task on time. He suggested that delegations reserve any statements of position they might wish to make for the plenary, which was the highest organ of the Conference and thus the best place for such statements to be recorded.

2. He welcomed Mr. Bos (Netherlands), former Chairman of the Preparatory Committee, who had hitherto been unable to attend the Conference owing to illness.

3. **Mr. BOS** (Netherlands) thanked participants and the Secretariat for their tokens of support, which reflected the spirit of solidarity that had developed among all those involved in the work of the Preparatory Committee and of the Conference itself.

4. The establishment of an international criminal court would represent a great step forward for the international community. In his view, the possibilities of compromise had now been fully exploited, and no purpose would be served by further delay, since the positions of States were already known. He urged the Conference to adopt the draft Statute by consensus.

5. **The CHAIRMAN** drew attention to the text for the Statute of the International Criminal Court proposed by the Bureau of the Committee of the Whole and contained in documents A/CONF.183/C.1/L.76 and Corr.1 (French only), Add.1, Add.2 and Corr.1, Add.3-4, Add.5 and Corr.1 and Corr.2 (French only), Add.6 and Corr.1, Add.7-8, Add.9 and Corr.1, Add10-13* and Add.14. The text reflected a very delicate balance between the views of delegations, and it was essential that that balance be preserved. It was the recommendation of the Bureau that the text should be adopted as a complete package.

6. **Mr. LAHIRI** (India) said that although his delegation would very much have liked to associate itself with the text proposed, it was unable to do so because two of India's major concerns had not been accommodated. The first related to the role of the United Nations Security Council and the second to the list of weapons whose use would constitute a war crime.

7. He drew attention to document A/CONF.183/C.1/L.94, which contained amendments proposed by his delegation to article 8, concerning war crimes, as it appeared in document A/CONF.183/C.1/L.76/Add.2. Their effect would be to include weapons of mass destruction, i.e. nuclear, chemical and biological weapons, among the weapons whose use would constitute a war crime. The absence of any mention of such weapons in the draft represented a retrograde step.

8. A second Indian proposal, contained in document A/CONF.183/C.1/L.95, related to the role of the Security Council. Article 16, concerning the deferral of investigation or prosecution at the request of the Security Council, would be deleted, along with subparagraph (b) of article 13 on exercise of jurisdiction, and there would be a

consequential amendment in article 12 concerning preconditions to the exercise of jurisdiction. The role for the Security Council proposed in the draft was unacceptable.

9. **Mr. FIFE** (Norway) said that the Bureau's proposal represented a compromise formula designed to achieve broad support and reflecting as far as possible a consensus approach. A package, almost by definition, would contain elements which displeased some delegations. It was essential to maintain the integrity of the package offered in order to avoid destroying the balance achieved with such difficulty and making it impossible to achieve the ultimate goal of an independent, effective and credible international court.

10. His delegation therefore proposed that no action be taken on the proposals submitted by the delegation of India.

11. **The CHAIRMAN** said that, under the rules of procedure of the Conference, two delegations would be permitted to speak in favour of the no-action motion put forward by Norway and two against it. He could therefore give the floor to a maximum of four speakers.

12. **Mr. CHIMIMBA** (Malawi) said that while he appreciated the rationale behind the Indian proposals, he considered that the issues they raised had already been fully discussed, and therefore supported the Norwegian proposal. The delegations of Angola, Botswana, Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe associated themselves with his delegation's view.

13. **Mr. MAQUIEIRA** (Chile) said that the Indian proposals had been debated at length but had not received the level of support to warrant inclusion in the text. His delegation thus also supported the Norwegian proposal.

14. **The CHAIRMAN** said that, since no delegations had expressed a wish to speak against the Norwegian proposal, he would invite the Committee to vote on it.

15. *The Norwegian proposal was adopted by 114 votes to 16, with 20 abstentions.*

16. **Mr. GONZALEZ GALVEZ** (Mexico) said that his delegation did not intend to block the consensus which seemed to be emerging on the text proposed by the Bureau, but wished to draw attention to its proposal in document A/CONF.183/C.1/L.81.

17. Mexico considered that the Statute was not the right place to resolve differences of interpretation concerning the powers of the principal organs of the United Nations, particularly in view of the fact that the United Nations itself was now undergoing a process of far-reaching reform which could include changes in the role and powers of the Security Council. To link the Court solely to the Security Council, many of whose decisions were limited by the right of veto, was in Mexico's view not only a grave political error but also a decision which was without foundation in law.

18. Mexico considered that any treaty establishing an international court which included clauses subordinating the juridical activities of that court to decisions taken by another body would not be in conformity with article 53 of the Vienna Convention on the Law of Treaties, which stated that a treaty which at the time of its conclusion conflicted with a peremptory norm of international law (*jus cogens*) was void. Any such clauses would contravene the principle of the independence of the judiciary and the right of everyone to a hearing by an independent tribunal, which were both peremptory norms enshrined in article 10 of the Universal Declaration of Human Rights, article 14 of the International Covenant of Civil and Political Rights, and paragraphs 1 and 2 of the Basic Principles on the

Independence of the Judiciary approved by the General Assembly in resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. They would also attribute to the Security Council functions and powers not conferred on it by the Charter.

19. Mexico would not insist that its proposed amendment be put to the vote, but the non-inclusion of its tenor would affect Mexico's eventual decision on the Statute as a whole.

20. **Mr. SCHEFFER** (United States of America) said his delegation deeply regretted that following four years of work it faced the end of the Conference with profound misgivings. The draft Statute was strong on paper but weak in reality. It did not contain the necessary opt-out provision to attract many States, and it attempted to exercise jurisdiction over the official actions of non-parties, a significant departure from the established principles of international law. It burdened the Court with a *proprio motu* prosecutor, an institutional weakness which could result in the Court's being overwhelmed with complaints and embroiled in controversy. Consequently, his delegation was obliged to request consideration of two proposals for amendment of the draft Statute, originally submitted in documents A/CONF.183/C.1/L.70 and L.90.

21. The United States supported the Geneva Conventions and acknowledged the importance of universality of jurisdiction in its proper context for the effective vindication of international law. However, the proposed Statute took the principle of universal jurisdiction far outside any acceptable context. Moreover, the attempt to impose the jurisdiction of the Court on States which did not become parties to the Statute would violate an elementary rule set out in the Vienna Convention on the Law of Treaties. The proposed Statute would also seek to place States parties in a privileged position vis-à-vis non-party States, by permitting prosecution of officials and nationals of non-parties while shielding officials and nationals of parties from prosecution for the same crimes.

22. His delegation's first proposal, in line with that in document A/CONF.183/C.1/L.70, was that article 12 on preconditions to the exercise of jurisdiction should be amended by the deletion in paragraph 2 of the words "one or more of", so that acceptance of jurisdiction by both the State on whose territory the crime had occurred and the State of nationality of the accused would be required. Under his delegation's second proposal, the content of paragraph 1 of article 7 *ter* in document A/CONF.183/C.1/L.90 would be inserted as a new paragraph following paragraph 2 of article 12. Paragraph 2 of article 7 *ter* in document A/CONF.183/C.1/L.90 coincided with the present paragraph 3.

23. He requested that his delegation's proposals be put to the vote in accordance with the rules of procedure of the Conference.

24. **Mr. FIFE** (Norway) said that in his view the package proposed by the Bureau was both credible on paper and responsible in reality. In the light of the urgent need to maintain the integrity of the package and to adopt the text as a whole, he proposed that no decision be taken on the proposals of the United States representative.

25. **The CHAIRMAN** said that, as in the previous case, permission to speak on the no-action motion just put forward by the delegation of Norway would be granted to two representatives in favour of it and two opposing it, whereupon the motion would be put to the vote. He would therefore ask the other speakers on his list to defer their statements.

26. **Mr. SALAND** (Sweden) said that his delegation believed it important to maintain the integrity of the text, whose delicate balance could be seriously upset if amendments were introduced at the present stage. Sweden therefore supported the Norwegian proposal.

27. **Mr. AL-THANI** (Qatar) said that his delegation had difficulty in accepting the package proposed, which had been inadequately considered. He accordingly endorsed the views expressed by the United States representative.

28. **Mr. LIU Daqun** (China) said that article 12, concerning the issue of jurisdiction, was the most important article in the whole Statute. As now drafted, it would mean violating the sovereignty of States parties, and would not only impose obligations on States not parties, contrary to the Vienna Convention on the Law of Treaties, but would in fact place greater obligations on them than on the parties. China was therefore opposed to the Norwegian proposal.

29. **Mr. MIKAELSEN** (Denmark) said that Denmark regarded the text as a package that should be adopted as a whole and without amendments. His delegation thus supported the motion put forward by Norway.

30. **The CHAIRMAN** invited the Committee to vote on the Norwegian proposal.

31. *The Norwegian proposal was adopted by 113 votes to 17, with 25 abstentions.*

32. **Monsignor MARTIN** (Holy See) said that he wished to explain his vote concerning the Indian proposals. His delegation condemned the use of nuclear weapons and other weapons of mass destruction, and fully understood the position of the delegation of India on that question. He hoped that when the Statute came to be reviewed attention could be given to that important issue, and that States would move forward rapidly to a balanced, multilateral and universal agreement for the elimination of all nuclear weapons. However, in the absence of agreement on that question at the moment, it had wished to support the package proposed by the Bureau.

33. **Mr. MATRI** (Libyan Arab Jamahiriya) said his delegation considered that to give the proposed prerogatives to the Security Council would reduce the Court to completely dependent status. His delegation also found it contradictory to regard the use of certain types of weapons as a crime but not the use of the most destructive and dangerous weapons of all. It was for that reason that his delegation had voted to maintain the Indian proposal.

34. **Mr. BOUGUETAIA** (Algeria) said that although the proposals by India and the United States would have met some of his delegation's concerns, he had responded to the Chairman's appeal so as not to re-open the debate. However, he wished to express his deep regret that the Committee had been obliged to resort to a vote.

35. **The CHAIRMAN** asked if the Committee was ready to adopt the draft Statute as contained in documents A/CONF.183/C.1/L.76 and Corr.1 (French only), Add.1, Add.2 and Corr.1, Add.3-4, Add.5 and Corr.1 and Corr.2 (French only), Add.6 and Corr.1, Add.7-8, Add.9 and Corr.1, Add.10-13* and Add.14.

36. *The documents were adopted on the understanding that the Arabic version would be corrected in the light of the English version.*

REPORT OF THE COMMITTEE (A/CONF.183/C.1/L.92)

37. **Mr. NAGAMINE** (Japan), Rapporteur, introduced the draft report of the Committee of the Whole (A/CONF.183/C.1/L.92).

38. **Mr. KROKHMAL** (Ukraine) noted that the draft resolution submitted jointly by the delegations of Belarus, Kazakhstan and Ukraine on the question of equitable geographical distribution (A/CONF.183/C.1/L.57) had not been reflected in paragraph 28 of chapter III of the draft report.

39. **The CHAIRMAN** said that that omission would be rectified.

40. **He took it that, subject to that amendment, the Committee agreed to adopt the report of the Committee of the Whole contained in document A/CONF.183/C.1/L.92.**

41. *It was so decided.*

42. **The CHAIRMAN** said that the Committee had completed its work.

The meeting rose at 9.20 p.m.